



The Bay Institute



May 14, 2013

Hon. Edmund G. Brown, Jr.  
Governor  
State Capitol Building  
Sacramento, CA 95814

RE: ELEMENTS OF A DELTA SOLUTION

Governor Brown,

We are writing to thank you for your Administration's recent response to some members of Congress who expressed concerns about the State Water Resources Control Board's (SWRCB) update of the Bay-Delta Water Quality Control Plan, and to urge you to actively support timely completion of this effort and related actions as part of the development and implementation of a comprehensive solution to the ecosystem restoration and water supply reliability problems of the Bay-Delta.

In their April 30 letter, Resources Secretary Laird, SWRCB Chair Marcus, and Delta Stewardship Council Chair Isenberg emphasized that the Board's update is "necessary to achieve the Delta Reform Act's co-equal goals of a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem," as well as a prerequisite to permitting future changes in diversion. They also observed "improved irrigation efficiencies, water transfers, conjunctive use, and other responses to reduced supplies are likely to substantially reduce the extent of any impact."

These statements underline the critical reality that stronger flow and water quality protections; more efficient conservation and management of existing water supplies; and improvements to the physical habitat and conveyance infrastructure in the current Delta, go hand in hand. There is an overwhelming scientific consensus that the ongoing, large-scale diversions of water from the

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Bay-Delta watershed have substantially reduced and altered freshwater flows, and are among the most important causes of native species declines and general ecosystem collapse. There is a growing understanding that innovative approaches to water use efficiency and storage could save millions of acre-feet of water for use in cities, industry and agriculture. There is widespread agreement that the current physical Delta is highly vulnerable to the effects of climate change and catastrophic events and that the virtual disappearance of the Delta's wetlands, floodplains and riparian habitats can and should be reversed.

In our view, a comprehensive Delta solution must encompass the following three elements:

- Strong, new flow and water quality requirements adopted and enforced by the SWRCB that are significantly more protective than existing requirements and are sufficient to meet the state's mandate to double populations of salmon and other migratory fishes, support viable, self-sustaining populations of a broad range of native aquatic species, and provide sustainable river and estuary habitat conditions for a healthy, functional Bay-Delta ecosystem.
- Aggressive and ambitious actions within areas exporting water from the Delta or diverting from its watershed to reduce reliance on the fragile Delta ecosystem as a water supply source and to promote local self-reliance through conservation, recycling, alternative supplies, and other means, as required by state law; and,
- Physical changes within the existing Delta to avoid disruption of the water supply system by catastrophic events and to restore large-scale blocs of habitat that can support a healthy Delta ecosystem, including conveyance and habitat improvements such as those being considered in the Bay-Delta Conservation Plan (BDCP) process.

Each of these elements is necessary to a comprehensive water supply reliability and ecosystem restoration solution; none is sufficient in and of itself. As Governor, you have spoken forcefully and clearly about the need for physical changes to the Delta, and promoted BDCP as a way to accomplish those changes. In addition to BDCP, we believe that the time has come for you to be equally clear and forceful about the need for major improvements in vital ecosystem flows and for a plan to help enhance water supply reliability through conservation, recycling, enhanced storage south of the Delta, and other alternative supplies.

While your Administration is currently taking actions related to flow protection and water use efficiency, these actions lack the urgency and ambition of your approach to BDCP. We believe you should commit your Administration to complete an update of the Bay-Delta flow and water quality standards within two years that is explicitly intended to meet the thresholds of salmonid doubling, native species population viability, and functional ecosystem habitat. Further, we believe you should commit your Administration to articulate and begin implementing within two years a comprehensive plan of incentives and disincentives that aggressively promote local water supply self-reliance, in order to decrease the pressure on the fragile Delta ecosystem and ensure compliance with the Delta Reform Act's mandate to reduce export water supply reliance on the Delta. Securing adequate ecosystem flows and ensuring that water is used more efficiently in

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areas that now rely on the Delta watershed are essential elements to reaching agreement on a comprehensive Delta solution that includes changes to Delta conveyance and habitat.

Our organizations have been working collaboratively and constructively for many years to help design and implement a comprehensive Delta solution. Our ability to support any proposed solution is directly premised on the satisfactory inclusion of all the solution elements we have identified. We urge you to direct your Administration to act quickly and decisively to make progress on major ecosystem flow protections and water efficiency improvements in order to implement the comprehensive solution so desperately needed. We are ready and willing to work with you toward securing that comprehensive solution.

Sincerely,



Gary Bobker  
The Bay Institute



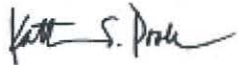
John Cain  
American Rivers



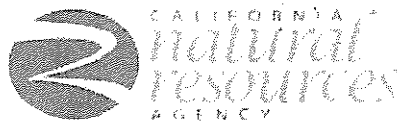
Kim Delfino  
Defenders of Wildlife



Leo Winternitz  
The Nature Conservancy



Katherine Poole  
Natural Resources Defense Council



DELTA STEWARDSHIP COUNCIL



April 30, 2013

Dear Members of Congress:

We are writing on behalf of Governor Brown in response to your March 21, 2013 letter concerning the coordination of planning efforts in the Bay-Delta by the State Water Resources Control Board (State Water Board), the Delta Stewardship Council (Council), and Bay Delta Conservation Plan (BDCP) participants. Our agencies have different responsibilities, but have coordinated processes underway to address various facets of California's water challenges. We are responding jointly on behalf of the state agencies involved in these Delta planning processes.

As you are aware, Delta issues are of statewide concern and of considerable complexity. In the Sacramento-San Joaquin Delta Reform Act of 2009, the California Legislature determined that the existing Delta policies were not sustainable and provided a framework for the sustainable management of the Delta ecosystem and water supply. Our agencies' concurrent planning efforts are intended to effectuate that framework in a coordinated fashion, while meeting the distinct statutory mandates and independent responsibilities of each agency.

Given the varying purposes, statutory mandates, and procedural requirements applicable to the three planning processes, complying with these requirements in a single proceeding or process is not feasible. But despite the different purposes of these planning efforts, the processes are proceeding in an integrated manner. For example, in order to implement the BDCP, participating entities will potentially need various approvals from the State Water Board or Regional Water Quality Control Boards, including water rights permits, changes to existing appropriative water rights, and Clean Water Act water quality certifications for various elements of the BDCP, including water conveyance facilities and habitat restoration. As another example, the State Water Board's current update of the Bay-Delta water quality control plan (Bay-Delta Water Quality Plan) will implement a key policy of the Council's draft Delta Plan that directs the state Water Board to adopt and implement updated flow objectives for the Delta. These updates are necessary to achieve



the Delta Reform Act's coequal goals of a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.

To the extent possible, each agency is coordinating with the others to develop and share technical information that may be used by an agency in its individual efforts. We must emphasize, however, each agency has an independent obligation to act under its own statutes and in keeping with the purposes of its own planning efforts.

Your letter focuses on concerns about the State Water Board's water quality control planning efforts in the Bay-Delta. The State Water Board is the state agency with primary responsibility for water quality control in California. In accordance with state and federal law, the State Water Board has adopted, and is required to update periodically, the Bay-Delta Water Quality Plan.

The State Water Board currently is considering proposed amendments to the Bay-Delta Water Quality Plan that will establish flow objectives and a program of implementation for the protection of fish and wildlife beneficial uses in the lower San Joaquin River and its three major tributaries (the Stanislaus, Tuolumne, and Merced rivers). The proposed amendments will also include revised southern Delta salinity objectives along with a program of implementation for the protection of agricultural beneficial uses. In accordance with the California Environmental Quality Act and other laws, the State Water Board recently released for public comment a draft Substitute Environmental Document (SED) that analyzes the environmental effects of the proposed amendments, as well as certain economic factors. The State Water Board also has begun evaluating other potential amendments to the Bay-Delta Water Quality Plan for the protection of fish and wildlife beneficial uses.

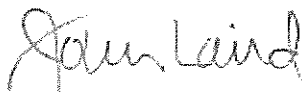
Your letter expresses concern over the potential for fallowing substantial irrigated acreage. The discussion in the draft SED of the potential fallowing is in the nature of a worst case analysis. The analysis assumes that projected reductions in irrigation deliveries will result in a proportional reduction in irrigated acreage. Experience indicates that this is improbable. Improved irrigation efficiencies, water transfers, conjunctive use, and other responses to reduced supplies are likely to substantially reduce the extent of any impact.

Moreover, the SED is an initial analysis step in the State Water Board's Bay-Delta Water Quality Plan process. The State Water Board has received extensive comments on this and other concerns about the draft SED, and will make appropriate revisions in the final SED. Of course, the State Water Board will take impacts on irrigated agriculture into account in determining what water quality objectives to adopt and how they should be implemented. The State Water Board's ultimate decision will be informed by the public comments and based on the law and science.

Finally, your letter raises concern that the State Water Board's water quality control planning process could threaten upstream senior water right holders. The program of implementation in the Bay-Delta Water Quality Plan will be developed consistent with California law, including state law protecting senior water rights and the needs of areas and watersheds of origin.

The State Water Board's update began before the BDCP and serves different objectives. Nonetheless, the State Water Board, Council, and BDCP have continued to coordinate and exchange information so our agencies' efforts do not work in conflict with one another. We hope this information addresses the concerns raised in your letter. Your letter will be included in the administrative records for the Bay-Delta Water Quality Plan, the BDCP, and the Council's Delta Plan.

Sincerely,



John Laird, Secretary  
California Natural Resources Agency



Phil Isenberg, Chair  
Delta Stewardship Council



Felicia Marcus, Chair  
State Water Resources Control Board

Identical letter sent to:

Honorable Jeff Denham, Member of Congress

Honorable Jim Costa, Member of Congress

Honorable Doug LaMalfa, Member of Congress

Honorable John Garamendi, Member of Congress

Honorable Devin Nunes, Member of Congress

Honorable Tom McClintock, Member of Congress

Honorable David Valadao, Member of Congress

cc: Honorable Edmund G. Brown Jr.  
Governor of California  
State Capitol Building  
Sacramento, California 95814

Honorable Dianne Feinstein  
United States Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510

Honorable Barbara Boxer  
United States Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

APR 24 2013

Mr. Alexander R. Coate  
General Manager  
East Bay Municipal Utility District  
375 Eleventh Street  
Oakland, CA 94607-4240

Dear Mr. Coate:

### BAY-DELTA RELATED PLANNING AND PERMITTING

Your March 28, 2013 letter to Secretary for Natural Resources John Laird and State Water Resources Control Board (State Water Board) then-Chairman Charlie Hoppin requests certain commitments in connection with the Bay-Delta Conservation Plan (BDCP) and the Bay-Delta Water Quality Control Plan (Bay-Delta Water Quality Plan). Recognizing the different roles and responsibilities of the agencies involved, I am responding on behalf of the State Water Board.

In the Sacramento-San Joaquin Delta Reform Act of 2009, the California Legislature determined that the existing Delta policies were not sustainable and provided a framework for the sustainable management of the Delta ecosystem and water supply. The Natural Resources Agency and its departments involved in the BDCP process have coordinated with the State Water Board, which will have to review and approve any BDCP-related water right change petitions, to effectuate the Delta Reform Act's framework. Likewise, the State Water Board's water quality control planning and implementation will also further sustainable management of the Delta ecosystem and water supply, but reach more broadly, recognizing the board's broader geographic and regulatory responsibility. Our agencies are acting in a coordinated fashion, while meeting the distinct statutory mandates and independent responsibilities of each agency.

It is important to recognize a key distinction between the BDCP and related approvals, including approval of any water right change petitions necessary to implement the adopted BDCP, on the one hand, and the Bay-Delta Water Quality Plan and implementation proceedings on the other. The BDCP is intended to obtain the approvals for the State Water Project and the Central Valley Project to operate consistent with state and federal endangered species laws. The BDCP is not intended to serve as the endangered species consultation or approval for other projects that may be affecting listed species in the Delta. Similarly, any water right change petition contemplated in connection with the BDCP would be for a change in the point of diversion for the State Water Project and the Central Valley Project, not for any other water right holders. The Bay-Delta Water Quality Plan, on the other hand, is intended to protect the beneficial uses of the Delta, taking into account the effect of all diversions, whether within or upstream of the Delta, that may affect Delta water quality.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE OFFICER

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

BDCP-Related Change Petition

The recently released draft chapters of the BDCP include several alternatives for dual or isolated conveyance, all involving a new point of diversion or points of diversion in the North Delta. Before implementing any of these alternatives, the Department of Water Resources and the United States Bureau of Reclamation would need approval of a water right change petition authorizing the new point or points of diversion. Water Code section 85088 further provides that construction of a facility cannot begin until the State Water Board approves the change in point of diversion.

In acting on a water right change petition, the State Water Board will be the decision maker in an adjudicative proceeding. Consistent with due process requirements and fairness to all participants in that proceeding, it would be inappropriate for the State to make any prior commitment as to what the outcome of the proceedings will be.

Of course, the State Water Board will act consistent with the legal requirement that that the change not operate to the injury of any legal user of water, and will condition or deny requested changes as necessary to apply that requirement. The State Water Board will also act consistent with applicable requirements for the protection of instream beneficial uses. And the State Water Board will act consistent with its own regulations.

The State Water Board's regulations include a standard permit term, already included in the water rights for the State Water Project and the Central Valley Project, reserving State Water Board authority to reopen the permit or license pursuant to the public trust and reasonable use doctrines. This standard term is consistent with the holding of the Court of Appeal in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82 that the public trust and reasonable use doctrines provide the State Water Board continuing authority to require the State Water Project and the Central Valley Project to implement applicable water quality objectives as established in the Bay-Delta Water Quality Plan. The State Water Board may consider adopting additional more specific reservations of authority in connection with its review of a water right change petition, but consistent with its role as an impartial decision maker, it would be improper for the State Water Board to make a commitment in advance to adopt any particular condition.

You also request that the State Water Board ensure that the BDCP EIR/EIS evaluate a proposed condition requiring the State Water Project and Central Valley Project compliance with revisions to the Bay-Delta Water Quality Plan. The State Water Board and the Department of Water Resources have consulted and will continue to work together to ensure that the environmental documentation for the BDCP includes the information necessary for any State Water Board approvals, including approval of any necessary water right change petitions. As instructed by the Court of Appeal in *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, any water right approvals will include any applicable requirements specified in the Bay-Delta Water Quality Plan's program of implementation. Similarly, the State Water Board will condition the water quality certifications for actions implementing the BDCP as necessary to implement the Bay-Delta Water Quality Plan and any other applicable water quality control plan or state policies for water quality control. The BDCP EIR/EIS is being prepared consistent with this understanding. Similarly, any additional environmental documentation prepared for specific restoration activities carried out pursuant to the BDCP will need to be prepared consistent with this understanding.



APR 24 2013

Water Quality Control Planning and Implementation

Your letter urges that the Bay-Delta Water Quality Plan confirm the policies incorporated in the BDCP. As discussed above, there is an important distinction between water quality control planning and the BDCP process. As part of its water quality planning function, the State Water Board adopts or updates water quality objectives and a program of implementation based on coordinated control of all factors affecting water quality. In *United States v. State Water Resources Control Board* the Court of Appeal held that it was error to adopt a plan based on what could be achieved through regulation of the State Water Project and the Central Valley Project, without considering the impact of upstream diversions. Accordingly, it is appropriate for the BDCP to focus on the impacts of Delta diversions by the State Water Project and the Central Valley Project, while leaving to other proceedings the impacts of upstream diversions. The State Water Board's Bay-Delta Water Quality Plan must take a broader view.

As part of the program of implementation adopted within the Bay-Delta Water Quality Plan, and in specific water rights actions implementing the plan, the State Water Board will be guided by the policies of the Water Code, including policies recognizing the rights of senior water right holders and preferences afforded the needs for beneficial uses within watersheds or areas of origin. All of these policies must be applied consistent with the fundamental policy to prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water. These principles are not necessarily consistent with your suggestion that no entity be required to make change in excess of that entity's proportionate contribution to the problem. In particular, a junior water right holder may be required to make curtailments before curtailments are imposed on senior water right holders, even if the junior water right holder's diversions are relatively small compared to those of senior water right holders.

In sum, while there are many different actions underway by the State Water Board and its sister agencies, they have been closely coordinated amongst the various agencies. These actions at times have common purposes, but the State Water Board's water quality control planning efforts are distinct and broader than just the BDCP or Delta. As the State Water Board continues development of its Bay-Delta Water Quality Plan I look forward to working with EBMUD and all interested persons.

Sincerely,

A handwritten signature in black ink, appearing to read 'Felicia Marcus', written in a cursive style.

Felicia Marcus, Chair

cc: Mr. John Laird, Secretary  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814



March 28, 2013

**SENT VIA EMAIL/FIRST-CLASS MAIL:**

John Laird, Secretary  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

Charles R. Hoppin, Chairman  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Dear Secretary Laird and Chairman Hoppin:

Thank you for your February 6, 2013 response to the December 20, 2012 letter requesting specific language in the Bay Delta Conservation Plan (BDCP) Draft EIR/EIS and in any State Water Board order approving water right changes needed to implement the BDCP. Our goal continues to be that implementation of the BDCP avoid the redirection of impacts to upstream water users.

We appreciate your acknowledgement of our concerns and are heartened by the policies of the California Natural Resources Agency that are articulated in your February letter, particularly the policies establishing that the BDCP "will not result in any exemption for the CVP and SWP from contributing water when the needs of the entire Delta are evaluated in the Water Quality Control Plan" and "will not impact upstream water users, whether to meet water quality requirements, increased flows, or for other mitigation requirements." To ensure the realization of these policies, we request that your agencies commit to the following specific actions in regard to the BDCP and the Bay-Delta Water Quality Control Plan (WQCP).

1. BDCP EIR/EIS. We would like a specific written commitment from the Natural Resources Agency that the BDCP EIR/EIS will analyze the potential impacts to the water supplies of water users that are not participating in the BDCP, and that the EIR/EIS will mitigate any such impacts. The analysis should recognize that any reduction in surface water supplies of water users not participating in the BDCP caused by any change in regulatory requirements to address BDCP project impacts -- whether the requirements modify river flows, adjust Delta outflow requirements, or impose additional restrictions on water diversions and operations -- is a significant impact.

We request that the written commitment also state that the BDCP EIR/EIS will mitigate these potential impacts by ensuring that, among other mitigations, the BDCP beneficiaries will fully participate in all phases of any State Water Board process to revise the WQCP and acknowledge that potential impacts to other water users are not unavoidable, but could instead be reduced by ensuring that the BDCP beneficiaries will provide additional flows, as appropriate. Consistent with the commitment, we request the following language in the BDCP EIR/EIS to describe this mitigation:

*Mitigation: "In petitioning for any water rights permits or permit changes for implementation of the BDCP, the project proponents will request the inclusion of terms ensuring that the permits or permit changes are granted subject to the continuing authority of the State Water Resources Control Board to impose specific requirements on the BDCP permittees and project participants to implement the San Francisco Bay/Sacramento San Joaquin Delta Estuary Water Quality Control Plan, as amended, including any water quality objectives, Delta outflow requirements, or instream flow requirements developed for the Delta or Delta tributaries pursuant to the Plan."*

2. State Water Board Actions on BDCP. We request that the State Water Board acknowledge its role in implementing the BDCP and acknowledge that any potential redirected impacts resulting from actions to implement the BDCP, including impacts from imposing additional flow obligations on water users that are not participating in the BDCP in order to increase the reliability of SWP and CVP deliveries, are an injury that must be avoided. We request that the State Water Board commit in writing to include in any permit or change issued to implement the BDCP a requirement that the permittees contribute water to meet the obligations imposed in any revisions to the Delta Water Quality Control Plan. We also request that the State Water Board ensure that this requirement, and the potential impacts that it is addressing, are analyzed in the BDCP EIR/EIS, which the agency will need to consider in undertaking any actions necessary to implement the BDCP.
3. Bay-Delta WQCP. We urge that the California Natural Resources Agency and the State Water Board commit that the policies set forth in your February 6, 2013 letter will be reflected in the final revisions to the Bay-Delta WQCP. We request that the Department of Water Resources acknowledge that in order to carry out the policies articulated in your letter, the BDCP must establish the baseline environmental conditions and baseline operations (in reference to which the BDCP beneficiaries are entitled to divert water) at the present CVP and SWP operational levels, and the EIR/EIS must set forth a commitment that mitigation for any increases in reliability above the present levels is the obligation of the BDCP permittees.
4. State Water Board Implementation of the WQCP. Finally, we request that the State Water Board confirm in writing that it will recognize water rights priorities and

John Laird, Secretary  
Charles R. Hoppin, Chairman  
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protections provided by the Water Code as it implements any changes in the Bay-Delta WQCP. We request that the State Water Board commit that any actions to implement revisions to the WQCP, either through amendments to water rights authorizations or through actions pursuant to other state or federal laws, will be undertaken only after finding that the affected entity's operations are the cause of the condition addressed by the action and that the action does not exceed the entity's proportional contribution to the condition addressed by the action.

Once again, the articulation of the policies of the Natural Resources Agency set forth in your February 6, 2013 letter and the State Water Board's recognition that the 'no injury' rule must be followed in making changes to water rights are appreciated. We believe that the commitments described in this letter will assist in assuring us, and other water users, that these policies will be implemented and used to guide the important water planning activities being undertaken by your agencies.

Very truly yours,



Alexander R. Coate  
General Manager

cc: Frances Spivy-Weber  
Tam Doduc  
Steven Moore  
Felicia Marcus  
Dorene D'Adamo  
Thomas Howard  
Gerald Meral



